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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Yuba)

NORCAL WASTE SYSTEMS, INC.,

Plaintiff and Appellant,

v.

STATE OF CALIFORNIA, DEPARTMENT OF
TRANSPORTATION,

Defendant and Respondent.

C059908

(Super. Ct. No.
YCSCCVPM060000745)

Plaintiff Norcal Waste Systems, Inc. (Norcal) appeals from a judgment entered after the trial court granted summary judgment in favor of defendant State of California, Department of Transportation (the State). This action stems from an accident that occurred around 2 a.m. on September 8, 2004, when Amber Thomas rear-ended a street sweeper owned by Norcal and driven by its employee, Kenneth Miller. Thomas later pled no contest to driving under the influence causing bodily injury.

Norcal sought recovery from the State for worker's compensation benefits paid to Miller on the theory the accident was caused by a dangerous condition of the roadway.

The trial court granted the State's motion for summary judgment because it found the State was immune from liability pursuant to the doctrine of design immunity as set forth in Government Code section 830.6.¹

Norcal argues the trial court erred because the state did not establish the elements which would entitle it to design immunity, because immunity was lost as a result of changed conditions, because the State failed to warn of a known dangerous condition, and because the trial court improperly considered the State's evidence.

We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The accident occurred at approximately 1:49 a.m. on State Route 20 (SR 20) at the east end of the bridge over the Feather River into Marysville. Thomas rear-ended Miller, who was driving a street sweeper for Norcal. The street sweeper was propelled forward over the right embankment, where it crashed into a tree, injuring Miller.

Thomas had been drinking, and was under the influence of alcohol at the time of the accident. She testified she was traveling between 45 and 50 miles per hour at the time of the

¹ Section references to an undesignated code are to the Government Code.

impact. She was aware that the speed limit was 45 miles per hour. She testified she never saw the street sweeper before hitting it.

At the location of the accident, SR 20 consisted of four traffic lanes, two lanes in each direction separated by a raised concrete median. The eastbound lanes (on which Thomas and Miller were traveling) are on a downgrade as the highway transitions from being a bridge over the Feather River to ground level near H Street in Marysville. There was an eight inch roadside curb at the accident site. There was no guardrail.

Norcal filed a complaint against Thomas and the State, and alleged it was entitled to recover damages from the State because the State "created and/or caused to exist a dangerous condition of public property within the State of California." The precise dangerous condition was not alleged. Norcal's damages consisted of the amounts it paid and would pay to Miller for worker's compensation, medical and hospital treatment, and salary, wages, and pension benefits. Norcal also sought to recover for property damage to its street sweeper.

The State moved for summary judgment. It argued the roadway was not a dangerous condition of public property when used with due care, and that any risk posed by the property was insignificant.² It also asserted design immunity pursuant to section 830.6.³

² Section 830, subdivision (a) provides: "'Dangerous condition' means a condition of property that creates a

The trial court granted the State's summary judgment motion. It first noted that Norcal's allegations were "general" and "conclusory . . . leaving the actual facts of plaintiffs' claim nebulous." The court then listed three conditions Norcal had identified as being dangerous: (1) "Limited sight stopping distance and improper lighting. Plaintiffs contend that the vertical curve of the roadway and the horizontal vertical drop

substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.

Section 830.2 provides: "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."

³ Section 830.6 provides in part that a public entity is not liable for : "an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor."

on the bridge presents an alleged limited sight distance and limited stopping distance to vehicles descending off the bridge into the signalized intersection of State Route 20 and I Street in Marysville, the direction traveled by both vehicles involved in the subject accident[;]" (2) "Failure to post warning signs to reduce speed and prepare to stop. Plaintiffs contend that the actual speed of vehicles using the bridge exceeds 45 miles per hour, and that the alleged median speed of vehicles on the bridge and the alleged limited sight stopping distance requires, at a minimum, a warning to drivers that they should reduce their speed and prepare to stop[;] and (3) "Failure to install a roadside barrier guardrail based upon the slope of the embankment to prevent run-off-the-road accidents and failure to have proper shoulder configuration and run-off area (clear zone). While discovery was still evolving, plaintiffs contended that the roadside curb was not of sufficient height.^[1] However, after further discovery, plaintiffs have modified their contention to now claim the need for a guardrail." Norcal does not object to this characterization of the identified dangerous conditions.

The trial court found as a matter of law that the accident site constituted a dangerous condition of public property. However, the trial court also found the State had shown undisputed evidence supporting the three elements of design immunity, i.e., a causal relationship between the plan and the accident, discretionary approval of the plan prior to

construction, and substantial evidence supporting the reasonableness of the design.

The trial court finally addressed whether design immunity had been lost as a result of a change in physical conditions of which the State had actual or constructive notice, and which it had a reasonable time to remedy. The court determined that the conditions of increased traffic volume, congestion, and traffic back-up were not factors in the accident. The trial court determined that the condition of increased speed did not result in the loss of design immunity because the bridge and its approaches were originally designed to accommodate speeds of 50 miles per hour, the posted speed was 45 miles per hour, and Thomas testified she had been driving between 45 to 50 miles per hour when the accident occurred. The trial court determined that none of the subsequent modifications to the bridge and approaches had changed the slope/crest of the bridge, thus there were no changed conditions regarding that aspect of the design. Finally, as to the State's failure to install a guardrail and to construct a minimum clear zone to reduce the incidence of run-off-the-road accidents, the trial court determined there was no evidence the accident rate for this kind of accident was sufficient to put the State on notice of a dangerous condition.

We agree with the trial court and shall affirm.

DISCUSSION

I

Design Immunity

The trial court found the existence of a dangerous condition of public property, but granted the State's summary judgment motion because it found the State was entitled to design immunity. The State's entitlement to design immunity required it to establish three elements: "(1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 66 (*Cornette*).) The first two elements, causation and discretionary approval, may be resolved as issues of law only if the facts are undisputed. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939-940.) The third element is to be determined by the court, not the jury. (*Cornette, supra*, 26 Cal.4th at p. 66.)

A. Causal Relationship

Norcal argues that the State's summary judgment motion asserted the accident was caused not by the design of public property, but by the negligence of Thomas. Therefore, Norcal argues, there is a factual issue regarding causation, and the State's claim of design immunity was improperly decided on a motion for summary judgment.

There was no inconsistency in the State's argument that it was not liable either because the accident was entirely

attributable to Thomas's negligence, or because design immunity relieved it from liability for any design defect. The cases cited by Norcal stand for the proposition that design immunity relieves the public entity from liability only when faulty design, rather than some other failing on the part of the public entity such as lack of maintenance, caused the accident.

(*Grenier v. City of Irwindale*, *supra*, 57 Cal.App.4th at pp. 940-941; *Higgins v. State of California* (1997) 54 Cal.App.4th 177, 185, abrogated on another point in *Cornette*.)

Norcal cites *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 575, which stated that design immunity "does not immunize against liability caused by negligence independent of design[.]" In that case there was evidence the public entity not only negligently designed the improvement in question, but also negligently maintained the improvement. Thus, the public entity's liability stemmed both from design and maintenance, and the defense of design immunity was not available to immunize it from negligence with regard to the maintenance of the improvement.

Here, by contrast, there is no evidence the accident was caused by some other act of negligence by the State. Thomas's negligence was an independent cause of the accident. If it was also the sole cause of the accident, the State would escape liability altogether. (§ 835 ["a public entity is liable for injury . . . if . . . the injury was proximately caused by the dangerous condition"].)

B. Discretionary Approval

The State proffered contract number 14TC5, the plans for the construction of the portion of SR 20 at issue here. The Feather River Bridge was constructed in the late 1940s to provide a connection between Marysville and Yuba City over the Feather River. The State also proffered each subsequent contract pursuant to which changes or improvements to the pertinent portion of SR 20 were made.⁴ The State's expert, Ronald Nelson, submitted a declaration detailing the approval process for each contract.⁵

⁴ The pertinent portion of SR 20, including the bridge and approaching grading, was constructed pursuant to State contract 14TC5. Pursuant to contract 3TC28-F, dated 1946, the bridge approaches were paved and gutters and walkways were added. Pursuant to contract 3TC47, dated 1948, landscaping was installed at the east end of the bridge. Pursuant to contract 57-3TC10, dated 1957, curb, gutter, and sidewalks were installed on a portion of the approach roadways. Pursuant to contract 03-100204, dated 1966, the highway was paved, traffic signals were installed creating an intersection at I street in Marysville, and a street was constructed under the bridge. Pursuant to contract 03-141304, dated 1969, a median barrier separating the two directions of traffic was installed. Pursuant to contract 03-144704, dated 1969, pavement markers were placed on the bridge and approaches. Pursuant to contract 03-914626, dated 1969, reflective markers were placed on the median barrier. Pursuant to contract 03-380504, dated 1997, the entire bridge was seismically retrofitted, but no changes were made to the bridge deck alignment or approaches. Pursuant to work order 556546, dated 2005, the bridge approach at the east end was repaved and restriped.

⁵ Norcal argues the trial court should have sustained its objection to the entirety of Nelson's declaration because it was unreliable and conclusory. We review the trial court's rulings on evidentiary objections for abuse of discretion. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th

Norcal argues the State claimed during discovery to have no documents showing the discretionary approval of the roadway plans prior to its construction, and that this discovery response amounted to an admission of fact to which the State is bound. Citing *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22, Norcal claims the admission made during discovery controls over any contrary declaration proffered in the summary judgment motion. We disagree.

First, the discovery response that Norcal claims was an "admission" was actually a letter from the State's attorney forwarding documents in response to a request to produce documents for a deposition. The letter was not signed under penalty of perjury. In it, counsel stated he was enclosing certain documents, and that "[n]o documents were found in response to [request number] 2," which was a request for all writing relating or referring to the approval of the original plans for SR 20. The letter went on to state, "Our search for pertinent and discoverable documents continues and I expect to send more next week, as my assistants may have been too limited in their search for the abundant documents that could be deemed related to your discovery." Thus, the letter indicated the State had not completed its search for the pertinent documents.

Norcal also argues there is no design immunity for "the severe horizontal curvature of the roadway and/or the 6.7

666, 679.) Nelson's declaration appears neither unreliable nor conclusory; therefore, the trial court did not exceed the bounds of reason in overruling Norcal's objection to the declaration.

percent grade at the east end of the bridge" because there was no evidence this feature was part of the pre-approved plans. However, the State proffered contract number 14TC5, which Nelson explained "provided the horizontal and vertical alignment of the bridge and approach roadway that existed at the time of the subject collision."

This contract also called for the approach grading. Nelson explained that the plans were approved on October 29, 1945, by State Highway engineer G.T. McCoy, and that after the project was completed the plans were stamped "As Built Plans" and marked with any significant changes made during construction.⁶ None of the subsequent plans relating to work performed on this section of the highway changed the horizontal or vertical alignment of the highway. Accordingly, there was no factual dispute that the current alignment of the highway was constructed pursuant to the original plans that were approved by the appropriate officials.

Norcal argues the trial court's inherent determination that the State had produced all the records it possessed regarding the original design, discretionary approval, and construction of

⁶ Nelson, who had worked as a Transportation Engineer at Caltrans from 1964 to 2000, explained that the plans for Contract 14TC5 were designed by engineers employed under the guidance of C.H. Whitmore, a District Engineer for the State, whose signature on sheet one of the plans indicated he approved the plans before forwarding them to Division of Highways headquarters office in Sacramento. The plans were then reviewed and recommended for approval by R.M. Gillis, Engineer of Construction, before being forwarded to the State Highway Engineer, G.T. McCoy. The final approval was by C.H. Purcell, the Director of Public Works.

SR 20 was "central" to its finding of design immunity. We find no evidence of this in the trial court's ruling. Norcal asserts the State should have submitted a declaration of a State employee attesting to that employee's search of all available records that demonstrated design considerations and discretionary approval.

Citing *Cameron v. State of California* (1972) 7 Cal.3d 318, Norcal asserts that such a declaration was required in this case involving an older roadway. Such was not the holding of *Cameron, supra*. In that case the Supreme Court reversed the trial court's grant of nonsuit in favor of the State. The court held that advance approval as required for design immunity had not been shown where the State's expert testified the approved plans omitted the particular dangerous design feature that was incorporated into the road as constructed. (*Id.* at pp. 325-326.)

Here, by contrast, the State's expert testified that: (1) the horizontal and vertical alignment of the bridge and approach roadway were properly approved in the original construction contract, and that the bridge and approaches were built according to plan; (2) that the curbs were eight inches high as called for in the properly approved plan; and (3) that no guardrails were specified in the original design, nor had any been installed. This evidence was sufficient to establish the first element of design immunity, and the trial court properly considered it.

C. Reasonableness of Design

The third element of design immunity requires the court to determine whether the design was reasonable. It is an issue to be determined by the court rather than the jury. (*Cornette, supra*, 26 Cal.4th at p. 66.) Moreover, the determination is not whether the court could find the design unreasonable based on conflicting evidence, but "whether there is any reasonable basis on which a reasonable public official could initially have approved the design." (*Compton v. City of Santee* (1993) 12 Cal.App.4th 591, 597.) As long as there was any substantial basis for a government official to have decided the design was reasonable, it is irrelevant that a contrary opinion might have been offered. (*Ibid.*) For purposes of summary judgment the public entity need show only that a reasonable employee could have approved the design as reasonable. (*Baldwin v. State of California* (1972) 6 Cal.3d 424, 429-431 (*Baldwin*).)

Here, the State's expert described the approval process for the highway plans, that the highway was constructed in accordance with those plans, and that the plans were reasonable. This was sufficient evidence of the reasonableness of the plans. (See *Baldwin, supra*, 6 Cal.3d at p. 430.)

1. Reasonableness of Road Grade and Alignment

Norcal argues the State's own evidence indicates the severe horizontal curvature of the highway presented a hidden dangerous condition, indicating the plans were not reasonable. The evidence Norcal cites are two "speed zone justifications" and an order decreasing the 55 mile per hour speed limit on state

highways to 45 miles per hour on the bridge in question. The speed zone justifications are dated 1998 and 2007, the latter being after the date of the accident. The order is dated 1989.

The first speed zone justification stated: "A condition not readily apparent to the driver is the vertical curve shape of the bridge between Yuba City and Marysville. The eastbound direction descends downhill off the bridge into a signalized intersection with limited stopping distance." The document concludes: "Based on this information and our engineering judgment, the existing 45 mph speed limit is appropriate and will be retained." The 2007 justification stated: "The sight distance is shortened in the eastbound direction as the road descends downhill off the bridge into a backup at a signalized intersection, creating a limited stopping distance." It also concluded: "Based on this data and our engineering judgment, the existing 45-mph speed limit is appropriate and will be retained." The order did not describe any conditions of the roadway, but merely stated that a 55 mile per hour speed limit was more than was reasonable and safe.

This evidence does not persuade us that the trial court erred. First, this element of design immunity is satisfied if the design was reasonable as initially approved. (*Compton v. City of Santee, supra*, 12 Cal.App.4th at p. 597.) The reports (and order) to which Norcal cites were all prepared long after the design was approved, and the alignment of the roadway was never changed. Second, this element of design immunity is satisfied if the trial court finds *any* substantial evidence upon

which a reasonable public employee could have adopted the design. (*Cornette, supra*, 26 Cal.4th at p. 66.) The fact that other evidence may exist pointing to an unreasonable design is not determinative. Third, these documents do not indicate that "the severe horizontal curvature of SR 20 presented a hidden dangerous condition for eastbound motorists." Rather, they merely indicate that the speed limit for the roadway, which was engineered for 50 mile per hour traffic, should not be increased because of limited stopping distance to the signalized intersection east of the bridge.

2. Reasonableness of Recovery Zone

Norcal argues it demonstrated that the plans for the clear recovery zone, i.e., "[a]n area clear of fixed objects adjacent to the roadway . . . to provide a recovery zone for vehicles that have left the traveled way," were not reasonably approved by submitting evidence there was an inadequate clear recovery zone, and that Miller would not have been as badly injured if the recovery zone had been adequate.

However, the evidence Norcal cites in support of this proposition is a 1998 Caltrans Traffic Manual. The manual stated:

"Studies have indicated that on high-speed highways, a clear width of 9 m from the edge of the traveled way permits about 80 percent of the vehicles leaving the roadway out of control to recover. Therefore, 9 m should be considered the minimum clear recovery area for freeways and high-speed expressways. High-speed is defined as operating speeds greater than 70 km/h.

On most conventional highways, because of lower speeds and volumes, a 9 m [29.53 ft.] clear zone distance may be difficult to justify for engineering, environmental or economic reasons. For these reasons, a minimum clear recovery area of 6 m [19.68 ft.] on conventional highways is advised. The designer must keep in mind that site-specific conditions such as volume, speed, alignment, side slope, weather, adjacent development, and environmental conditions should be evaluated when determining the clear recovery zone."

Norcal presented evidence that the clear recovery zone at the location of the accident was approximately 10-12 feet.

The evidence Norcal presented was from a traffic manual dated 1998, and no evidence was presented of the standard existing when the roadway was built in the 1940s.⁷ Thus, the later standards had no bearing on the element of design immunity requiring the design to be reasonable as initially approved. None of the subsequent plans for this portion of SR 20 were for the modification of the clear recovery zone.

Additionally, the trial court makes a determination on this element of design immunity under a substantial evidence standard. Thus where, as here, there is any substantial evidence the design was reasonable when adopted, it is not determinative that other evidence may point to the design's unreasonableness.

⁷ The State proffered a 2001 design manual indicating the minimum desirable clear recovery zone width for conventional highways with curbs (this roadway had curbs) was .5 meters, or 1.64 feet.

3. Reasonableness of Guardrail

There were no guardrails bordering SR 20 at the accident site. There were no established criteria for the installation of guardrails when the bridge and the approaching roadway were constructed. Thus, the failure to install guardrails when the project was constructed was not unreasonable.

We disagree with Norcal's assertion that the State could not establish it was entitled to design immunity regarding guardrail placement because there were no guardrail standards to consider when the roadway was built. Rather, the design of the roadway was approved by the State, that design did not contain guardrails, and such design was not unreasonable because no guardrail standards were in existence at the time. Norcal cannot point to elements of the design that do not exist and claim that because those elements do not exist, the State cannot claim design immunity as to those elements. It is the approved design as a whole that we look to in determining design immunity.

II

Loss of Design Immunity

A plaintiff may demonstrate loss of design immunity by establishing: "(1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a

reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings." (*Cornette, supra*, 26 Cal.4th at p. 66.)

Norcal argues the State admitted SR 20 underwent many physical changes after its construction, but does not specify what those changes were. The trial court considered several operational characteristics, which the physical changes affected. The trial court determined design immunity was not lost because such operational conditions did not apply, or because the State had no notice of such conditions. We agree.

A. Traffic Congestion and Speeding

Norcal points to the road's "aberrant accident history" as proof the changed conditions created a dangerous condition. However, design immunity is lost only if the particular dangerous condition is one that caused the accident in question. (*Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378, 387 [Section 830.6 must be read in conjunction with section 835, which makes a public entity liable if injury is caused by a dangerous condition that created a reasonably foreseeable risk of the kind of injury incurred.]) Assuming Norcal's evidence of a history of accidents on the road proves a dangerous condition existed, that dangerous condition was created because of speeding and traffic congestion resulting in a backup of vehicles on the bridge. Since the accident here occurred in the early morning hours with virtually no traffic, and Thomas's

speed was not excessive, the dangerous condition, if it existed, was irrelevant.

Norcal proffered a traffic investigation showing 20 accidents occurred on the Feather River Bridge between 1996 and 1999. However, this investigation also stated that 18 out of the 20 accidents were rear end accidents from heavy afternoon congestion in Marysville. Also, the investigation was at a point on the bridge located westerly from the subject accident, and was for wet pavement accidents. The nature of the accidents in the report was not sufficiently similar to the subject accident to give notice of the dangerous condition that caused the subject accident.

Norcal also points to two traffic investigation reports and a project study report as evidence of an aberrant accident history. None of these documents indicated there was a dangerous condition that contributed to the accident here. The first traffic investigation report was dated 1998, and included accident summaries for 1995 through 1997. The copy of the report contained in the record is largely illegible, but the traffic investigation report dated 1999 contained accident summaries for 1995 through 1998, thus included most of the accidents summarized in the earlier report. The 1999 traffic investigation report indicated the rear end accidents occurred mainly during the evening commute and were congestion related. The report also documented accidents occurring between post mile .193 and .393, which was to the west of the area of the subject accident at post mile .46. The project study report, dated

1991, was for the construction of a merge lane for traffic entering SR 20 in Yuba City, and has no relevance to this accident, which occurred on the Marysville side of the bridge.

The evidence of prior accidents proffered by Norcal related to a dangerous condition west of the accident site in question, created by traffic congestion during the evening commute. Such evidence indicated neither a dangerous condition relevant to this accident, nor any notice to the State of such a condition.

As a related matter, Norcal asserts the State was liable pursuant to section 830.8 for failing to warn of a "dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care." Norcal claims the dangerous condition was the limited sight stopping distance.

However, since the evidence that Norcal offered to prove the condition was dangerous was a traffic investigation performed by the State indicating the accidents occurring on eastbound SR 20 were caused by heavy afternoon congestion, resulting in rear end collisions when traffic backed up from the signal light, and since the accident at issue here did not occur during a period of traffic congestion, but at 2:00 a.m., there is no evidence the dangerous condition Norcal claims was a cause of the accident. Therefore, no warning that traffic tended to backup from the signal during heavy traffic would have prevented the accident.

Also, evidence offered by the State indicated there were two roadside signs that warned of the signal light ahead, and one of these signs was accompanied by overhead flashing lights. The words, "signal ahead" were also painted on the pavement at the accident site. Thomas, who lived in Yuba City and had been driving over the bridge for 26 years, was well aware of the speed limit and the traffic light just past the east end of the bridge. The evidence is undisputed that a failure to warn of a dangerous condition was not a cause of the accident here.

Norcal also presented evidence that the 85th percentile speed of eastbound traffic on SR 20 was between 49 and 53 miles per hour, notwithstanding the posted speed of 45 miles per hour. Norcal argues this presents an unsafe condition since the design limit of the roadway is 50 miles per hour.

The trial court properly considered this evidence irrelevant because there was no evidence of speeding in the subject accident and because the State is not responsible for enforcement of the speed limit. (§ 830.4.)

B. Guard Rail

The change in guardrail standards did not create a changed physical condition. A change in design or engineering standards does not constitute a changed condition leading to a loss of design immunity. (*Sutton v. Golden Gate Bridge Highway & Transportation Dist.* (1998) 68 Cal.App.4th 1149, 1162-1163; *Dole Citrus v. State of California* (1997) 60 Cal.App.4th 486, 493.)

There are two predicates to the loss of design immunity: changed conditions and notice. (*Wyckoff v. State* (2001) 90

Cal.App.4th 45, 58.) Assuming there were changed conditions, we agree with the trial court that the history of run-off-the-road accidents at this location did not constitute such an aberrant accident history that the State would have had notice of a dangerous condition.

The State proffered evidence that its standards specify that for an existing highway to qualify for the placement of guardrails, two criteria must be met. First, it must meet Caltrans's equal severity curve, whereby running into a guardrail is less severe, on average, than running down the embankment. Second, the location must have experience a high run-off-of-the road accident history. While the embankment in question met the equal severity curve, it did not have a history of run-off-the road accidents.

During the 8.68 year period from January 1, 1996, to September 8, 2004, only three motor vehicles went over the embankment. In only one of these accidents did the vehicle hit an object after leaving the pavement, and in that case the driver suffered no injuries. In none of the three accidents was anyone injured as a result of striking an object after leaving the pavement.

Three accidents in a period of more than eight years where the vehicles left the pavement do not give notice of the dangerous condition encountered in this accident. This is especially true when none of those accidents resulted in injury from the vehicle striking an object after leaving the pavement.

C. Clear Recovery Zone

Just as the three accidents indicated above did not give notice of a dangerous condition for run-off-the-road accidents causing injury for purposes of erecting guardrails, they did not give notice of a dangerous condition for purposes of constructing a wider clear recovery zone. Thus, assuming a change in physical conditions affecting the clear recovery zone, the State did not lose design immunity for the design of the recovery zone because it did not have notice of a dangerous condition.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

SIMS, J.

HULL, J.